NO. 1576

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

DEAN COAL COMPANY,
Respondent.

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

W. R. PARTON d/b/a PARTON COAL COMPANY,
Respondent.

On Petition for Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

As stated in the petition, the Sixth Circuit's opinion on the second appeal appears in Appendix B to the petition,

and is in the certified transcript of record. The opinion has now been officially reported in 421 Fed. (2) 1380. However, the opinions of the lower courts on and before the first appeal are important in this case. These cases were first decided by the District Court in 1966 in *Lewis v. Pennington*, 257 F. Supp. 815, 864-870; remanded for further consideration in 400 F.2d 806, 815-818.

JURISDICTION

As stated in the petition the Sixth Circuit's judgment was entered February 18, 1970. This Court's jurisdiction was invoked by the petitioner under 28 U.S.C.A. §§ 1254(1) and 2101(c).

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

As stated in the petition, jurisdiction of the District Court was based upon the Sherman Act (15 U.S.C.A. §§ 1 and 15) and upon the principle of pendent jurisdiction by which principle it was found by the District Court and the Court of Appeals that the District Court had jurisdiction to determine state law causes of action asserted by the respondents, Dean and Parton.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. IN DAMAGE ACTIONS AGAINST A NATIONAL LABOR UNION SUBJECT TO § 6 OF THE NORRIS-LeGUARDIA ACT, MAY LIABILITY BE BASED UPON UNLAWFUL ACTS OF FIELD REPRESENTATIVES AND DISTRICT OFFICERS OF THE UNION WHO ARE CLEARLY AUTHORIZED TO TAKE SUCH STEPS AS WERE NEC-

ESSARY, INCLUDING VIOLENCE AND THREATS OF VIOLENCE, TO OBTAIN SIGNATURES OF THE SMALLER COAL COMPANIES UPON THE NATIONAL CONTRACT AMENDMENTS WHICH HAD PREVIOUSLY BEEN NEGOTIATED BETWEEN THE INTERNATIONAL UNION AND THE MAJOR COAL COMPANY ASSOCIATIONS?

2. IN ACTIONS FOR DAMAGES UNDER STATE LAW AGAINST A LABOR UNION BASED UPON ACTS OF VIOLENCE AND THREATS OF VIOLENCE, DID THE EVIDENCE SUFFICE TO SUPPORT THE AWARD OF COMPENSATORY DAMAGES?

STATUTE INVOLVED

As stated in the petition the principal statutory provision involved in these cases is Norris-LeGuardia Act, § 6 (29 U.S.C. § 106).

COUNTER-STATEMENT OF THE CASE

A. The Kind of Action.

These cases deal with claims of Parton Coal Company (Parton) and Dean Coal Company (Dean) based upon violations of Tennessee law by United Mine Workers of America (UMW), such violations consisting of engagement in violence and intimidation in getting the UMW's national contract amendment of December 1958 signed by the smaller coal companies of Tennessee in the year 1959.

These claims were asserted by these two companies as alternative claims in suits against UMW in which the principal claims were based upon alleged conspiracy with major companies to force the national contract terms on the smaller companies in violation of the Sherman Act.

These cases were combined with the cases of a number of other small Tennessee coal producers for trial without a jury in what has become known as *Second Pennington* (*Lewis v. Pennington*, 257 F. Supp. 515, affirmed 400 F. 2d 806, cert. denied 393 U.S. 98).

B. Action of the Lower Courts on the First Appeal.

These plaintiffs lost on the principal claim based upon the Sherman Antitrust Act, but they won in the District Court on the claims for violence and intimidation (239a-253a; 257 F. Supp. 864 et seq.).* The District Court awarded compensatory damages of $110,000 plus $50,000 in punitive damages to Parton, and the Court awarded $101,787.41 compensatory damages plus $50,000 punitive damages to Dean (253a; 257 F. Supp. at 870).

On the first appeal, the Court of Appeals for the Sixth Circuit sustained the action of the District Court in maintaining jurisdiction over the state causes of action even though the Sherman Antitrust claim was dismissed. The Court of Appeals said:

> "The first question is whether the District Court properly concluded that it had pendent jurisdiction of the common law action in these cases brought originally as actions arising under the Sherman Act. Even though a diversity of citizenship between the parties does not

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* In this Brief we make reference to the same records which are referred to in the Petition for Certiorari. Page references with the suffix "a" are to the volumes of the certified record entitled Joint Appendix, as filed in the Court of Appeals. Page references with the prefix "JSA" are to the volume of the certified record entitled Joint Supplemental Appendix, as filed in the Court of Appeals. References to the Appendix to the Petition are indicated by the symbol "A". (See the footnote in the Petition, page 2).

exist, a federal court has pendent jurisdiction to resolve a state law claim asserted under certain circumstances with a federal claim. Armstrong Paint & Varnish Works v. NuEnamel Corp., 305 U.S. 315, 59 S. Ct. 191, 83 L. Ed. 195 (1938); Hurn v. Oursler, 289 U.S. 238, 53 S. Ct. 586, 77 L. Ed. 1148 (1933). Such pendent jurisdiction was also found to exist in United Mine Workers of America v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). Therein the Supreme Court stated two of the requirements for the exercise of pendent jurisdiction to be (1) that the federal claim have 'substance' so as to confer jurisdiction of the subject matter on the court in which the action is commended and (2) that the 'state and federal claims must derive from a common nucleus of operative fact.' The UMW concedes in spite of the District Court's ultimate dismissal of Dean's and Parton's federal claims, that those claims were 'substantial' with the meaning of *Gibbs*. It strenuously challenges the existence of a 'common nucleus of operative facts,' arguing that the Sherman Act claim 'embraces so many allegations irrelevant in time and content to the state claim, that to find there is a "common nucleus of operative fact" is to destroy the practical significance of this requirement.' However, it cannot be denied that there is at the very least a significant overlapping of the facts alleged and proved under the Sherman Act and state law claims, and it cannot be said that the District Court's resolution of this issue in favor of jurisdiction was a clearly erroneous abuse of discretion." (400 Fed. (2) 815-7)

With respect to the contention of the defendant that the state law against violence and intimidation (which was the basis for these state law claims) was preempted by federal

labor law and that UMW had a federally established right to engage in strikes and picketing, the Court of Appeals said:

> "it is initially observed that the Court in United Mine Workers v. Gibbs, 383 U.S. 715 729, 86 S. Ct. 1130, 1140 (1966) held that the 'permissible scope of state remedies in this area [of violence in labor disputes] is strictly confined to the direct consequences of such conduct, and does not include consequences resulting from associated peaceful picketing or other union activity.' See also Teamsters Local 20 v. Morton, 377 U.S. 252, 84 S. Ct. 1253, 12 L. Ed. 2d 280 (1964). And in International Union, U.A., A. & A.I.W. v. American Metal Products, Co., Tennessee, 408 S.W. 2d 682, 707 (1964), the court held that 'plaintiff is not entitled to recover losses resulting from the exercise by the defendant Unions of their lawful right to strike.' In the case at bar, it cannot be said that the District Court, which found inter alia that the losses sustained by Dean and Parton were 'caused by violent conduct' instigated and carried out by UMW members and officials, disregarded the above presumption principles and permitted recovery for losses sustained by the Companies due to lawful union activity." (400 Fed. (2) 817)

The Court of Appeals held that there was ample evidence to support a judgment for violence and intimidation against UMW saying:

> "We are of the opinion that in this lengthy record of a protracted trial, including testimony of interference with hauling operations, verbal threats of work stoppages, the wanton discharge of firearms, the placing of dynamite charge (albeit unexploded), distribution

of gasoline in areas of frequent destruction by arson, all in a locality tense with fear and anger, evidence exists from which conspiracy to commit illegal violence could be found, and that evidence was presented upon which damages under Tennessee law could be predicated." (400 Fed. (2) 816)

However, on the first appeal the Court of Appeals was not satisfied that the District Court had applied the proper standard with respect to the burden of proof. The District Court had made it plain that it was applying Norris-LaGuardia's § 6 "clear-proof rule" as to the Sherman Act Antitrust claim, but had not specifically stated that it was applying the Norris-LaGuardia rule as to the state law causes of action. Accordingly the Court of Appeals remanded the cases to the District Court for consideration of the burden of proof saying:

"As already indicated, however, we cannot on that record and from the District Court's opinion determine that the proper requirement as to the degree of proof was applied as to the elements essential to liability and recovery of damages in the amounts assessed. Accordingly, it is concluded that a remand for the purpose of reviewing the evidence in the light of the proper standard of proof is required.

"If liability is established upon remand, either by reexamination of the evidence in light of the proper standard or by confirmation that such standard had in fact been applied in the first instance, an award of damages attributable to the UMW's violence would of course be proper." (400 Fed. (2) 816)

Also on the remand the Court of Appeals instructed the District Court to make more specific findings with respect to the amount of damages arising from violence and intimi-

dation. The Court of Appeals was particularly concerned with variations in wages and prices in the damage period and asked that the District Court make more specific its findings upon these subjects. (400 Fed. (2) 818)

C. Actions of the Lower Courts Following the Remand After the First Appeal.

As stated above, the District Court, on its first consideration of these cases, discussed the clear-proof rule and expressly applied it with respect to the antitrust claims, but had not specifically referred to it in connection with the alternative claims based upon the state law. For this reason the Court of Appeals remanded the case for further consideration of the standard of proof.

On the remand the District Court affirmed that it had applied the Norris-LaGuardia § 6 "clear-proof rule" with respect to these state law causes of action and said:

> "This Court intended to apply the "clear proof' standard in its findings and conclusions contained in its original memorandum. We were familiar with that standard at the time the cases were tried. We now reaffirm our original findings that clear proof established that the defendant, United Mine Workers of America, through its field representatives authorized, participated in, or ratified the wrongful acts of violence set out in this Court's original memorandum and that those acts of violence were the proximate cause of damage to plaintiffs Parton and Dean." (JSA 4)

The District Court, at JSA pages 4-12, goes into considerable detail in analyzing the price and wage changes affecting Dean and Parton and responded fully to the second point to be considered on the remand after the first appeal. As a result of this detailed consideration, the

District Court modified the previous judgment and entered judgment for Parton for $79,800 compensatory damages plus $50,000 punitive damages or a total of $129,800 (JSA 12). For Dean the Court entered judgment in the amount of $77,500 compensatory damages plus $50,000 punitive damages or a total of $127,500.

In a short per curiam opinion the Court of Appeals affirmed the action of the lower court taken after the remand with the comment:

> "Judge Taylor's memorandum on remand clearly demonstrates the zeal with which he approached the task of determining compensatory damages and the fact that he was conscious of the mitigating factors as well as the affirmative elements of damage to be considered."

COUNTER-STATEMENT OF FACTS

A. There is an Abundance of Evidence to Establish Liability for Violence; this Record is not like the Record in United Mine Workers v. Gibbs; this Record shows the Campaign of the International Union over a period of many years to force the National Contract Amendments upon such companies as these Plaintiffs by any means whatsoever Through District Representatives and Local Agents.

Petitioner tries hard to mold its statement of the facts into a pattern that would fit into the decision of this Court in *United Mine Workers v. Gibbs*, 383 U.S. 715. But the two records are as different as night and day.

In *Gibbs* the evidence as to violence related to an incident that occurred only with respect to the plaintiff com-

pany and when this occurrence took place no union agent was in the vicinity but all of them were attending a district meeting in a different state. When the slight violence that appears in that record occurred the agent that covered the particular area came rushing back with orders to stop the violence.

But in this case we have the evidence before the Court of many years of efforts by the international union, through district officers and district field representatives and other local agents, to force the signing of national contract amendments upon such companies as these plaintiffs. UMW in its petition would ignore the history of custom and traditional practice of the union through its authorized representatives to obtain the contract signatures which were concededly the object of the violence in this case. UMW would confine its references to what was going on to the most direct efforts of stopping these two plaintiffs from operating and even ignore some of those efforts.

As a matter of fact this record shows that what was going on in the period of damage in this case was just one more of the episodes of UMW inspired campaigns of violence and terror, and the record thoroughly documents the campaign involving many field representatives, not only in 1959 but also in the previous campaigns.

UMW would have the Court believe that employees of these plaintiffs had no reason to fear for their lives when they stopped work, and UMW would paint a picture of men making a voluntary and uncoerced choice as to whether to work or not work. Obviously a long period of shutdown was in prospect, as experienced in previous years, when there was either a stoppage of work or violence of the most disgraceful and most reprehensible character to be suffered.

Those that stopped work had only one choice to separate themselves and their families from starvation, and that was to sign up for the small weekly handouts that the union gave to those who agreed not to work. Once one of these campaigns starts, the only choice given the men in the coal field is to stop work and accept UMW's dole, or to face extreme danger to life and limb.

Because the principal claim in these cases was that there was a conspiracy to force the UMW contracts on the whole industry, the present record contains a detailed history of the United Mine Workers and the constant effort, over a period of fifteen years, by its governing bodies and international officers, to impose the National Bituminous Coal Wage Agreement on such companies as plaintiffs. International union officers proudly told the membership that the International's campaign was progressing in spite of numerous injunctions issued by the courts across the country (819a-821a).

While the signatures were obtained for the larger companies through the membership of those companies in the several larger coal associations, the job of getting the smaller companies (like these plaintiffs) signed up was left to the UMW district representatives or field workers. These representatives had no authority to change the language of the printed contracts but they had the job of getting the signatures to the contracts and the UMW witnesses themselves testified about how the district presidents (appointed and paid by the international) gave them *full leeway* in how they would get these signatures, often obtained by the use of caravans of cars loaded with men visiting the isolated small mines (686a, 689a, 1094a-1097a).

Now, just how did these field representatives conduct themselves in getting the signatures? Or, as this Court said in *Gibbs*:

" 'The relevant question, however, is whether Gilbert or other UMW representatives were clearly shown to have endorsed violence or threats of violence as a means of settling the dispute.' " *Id.* at 741.

In the *Gibbs* case it is not at all clear from the bare facts recited just what was going on at the mines except that UMW local members claimed Gibbs was trying to bring in outside men to take jobs away from them. The larger picture was not in the *Gibbs* record, and courts can decide cases only on the basis of records duly made or on facts judicially known and noticed.

Also the burden of the recited facts in *Gibbs* is that the *one* field representative involved was not present on the one or two days of violence but was attending a district meeting in Kentucky and was sent back home to restore peace according to union testimony.

On the other hand, in the present cases there is record evidence of participation in mob activity, threats of bodily harm or solicitation of acts of property destruction by *five* field representatives, acknowledged agents of the International Union, Prater, Ross, Jones, Daniel and Maddox (317a-320a; 645a-647a; 655a-656a; 663a; 889a; 926a-927a; 1097a; 412a; 755a-758a; 837a; 848a; 869a; 905a; 423a-426a; 888a; 915a; 925a; 1499a). Only the first two testified. The testimony about all but the first two goes completely undenied.

This record has sufficient depth in time to prove the violent nature of the conduct frequently or traditionally resorted to, not just in 1959 but in earlier periods also, in order to obtain contract signatures, and UMW accepted these contracts obtained by violence along with all the others. In the drives after 1950 and before the 1959 campaign in this area, there were a number of acts of terror-

ism, brutal beatings, clubbings, and actual torture in which field representatives participated (316a-320a, 645a-647a, 655a-663a). If there is any doubt that there can be, and is, rule of coal mining areas by UMW field representatives by means of terror and fear to get contracts signed just as in this case, the testimony on the record pages just referred to must be read. It is not disputed here in this record.

The UMW got the benefits of the resulting contracts. UMW representative Les Jones threatened the plaintiff, Parton, with the "Jones boys" when he tried to avoid signing the union contract (412a). As a result the UMW Welfare Fund obtained a $58,777.69 judgment against Parton earlier in this litigation (433a), based on a contract which was extracted in this way and under which the Parton employees received not one nickel of benefits in return (413a). A contract was extracted from Pennington and Phillips, and when later a mob visited their mine and the field representative was asked why the mob had come, the representative told them they could get it fixed up by going to district headquarters and straightening out their contract affairs with the district and that is what they did (291a-292a; 307a-308a). When a mob beat him up and closed his mine for operating non-union, Alonzo Cox signed the contract with the field representative and was able to open up again (658a). Some operators, like Andrew Frost, found it impossible to operate after a visitation by the caravan without signing the UMW contract (647a).

But it was the 1959 campaign that topped all previous UMW efforts in this area. The cases which have previously come before this Court reflect this fact. It was in 1959 that UMW was seeking to impose the December, 1958 amendment to the national contract which contained the Protective Wage Clause. In 1959 the funds of the inter-

national union furnished to District 19 jumped from less than $100,000 annually to $2,473,000 in that year (691a). The UMW contracts of the operators throughout the area were cancelled and the union was seeking to get signatures to the new contract. Many refused (693a).

This drive opened with the "custom or traditional practice" of caravans containing large numbers of men (up to 85 carloads by actual count, 296a). The caravan of March 16, 1959, led by field representatives Prater and Daniel, closed the White Oak Coal Company as well as plaintiff, Dean Coal Company (755a-758a; 837a). Another field representative, Ross, also led a caravan, and in addition arranged for the payment by District 19 of gasoline required by the roving pickets (888a, 915a, 925a, 1499a). One of the roving gangs whose gasoline was thus provided for closed up Parton's mine and forced him to dump his trucks loaded with coal (418a-420a).

Reading UMW's petition, one would get the impression that there was nothing going on at all, and no reason to have any anxiety about life and limb, and that the miners were free to contemplate their economic future and make a free choice. Nothing at all is said about the matters mentioned above or that there had been anything that had gone on before that would serve to give these men a moment's bit of worry. This was the approach made by UMW at the trial. This was the nature of the testimony of field representative Prater, but not of Dean foreman, Hatmaker. Counsel tried with great insistence to get this witness and other witnesses to go along with their theory of peace and harmony but failed as is shown by the following answers to questions on cross-examination by UMW counsel.

"Q Didn't they say, 'We are going to wait until the men come off the mountain at the end of the shift and we want to talk to them'?

"A No, sir.

"Q Isn't that what they did?

"A No, sir.

"Q What time did you normally quit work?

"A 4:00—I believe around that time about 4:30 or 5:00 o'clock. We worked quite a bit of overtime then, possibly later.

"Q The men, the truck drivers, when they got there, the truck driver, they told him to wait, to do dump his load and then they sat around and waited for a long time until the men quit work and came off the mountain?

"A They sat and waited till I went up and knocked the men off, and I believe the record shows we gave them the shift for the day but I believe it was 3:30 when I knocked them off.

"Q 3:30?

"A I believe it was, before the shift was over.

"Q Are you sure of that?

"A Fairly sure.

"Q And you went up and told them to come on down?

"A Told them they had stopped us from hauling coal and there was no use staying any longer.

"Q There was nothing you could do up there after they stopped hauling coal, is that right?

"A Well, we could have worked.

"Q You could have continued on doing your normal work, couldn't you?

"A Possibly, but we was afraid of getting beat up or something.

"Q Yes, but you went up and shut them down, you said, because you couldn't haul coal. That wasn't cor-

rect, was it?

"A They said we couldn't mine or load any more coal, and we quit" (841a-842a).

UMW Representative Prater testified on cross-examination about his stopping of the operations of G & R Coal Company as he did in *Gilchrist v. UMW*, 290 F.2d 36, 38 (C.A. 6, 1961), cert. denied, 368 U.S. 875 (1961) (1467a-1468a). Witnesses Allen, Orick and Daugherty, corroborated by the witness Smith, testified as they did in *Allen v. UMW*, 319 F.2d 594 (C.A. 6, 1963), about the stopping of the hauling of non-union coal on the public highways under UMW exhortation and with the use of UMW funds (888a-889a; 916a-917a; 924a-926a; 931a-933a).

The organizing campaign was over a broad front in Tennessee and Kentucky where District 19 operates.

An injunction in the District Court of Eastern Kentucky was obtained by the National Labor Relations Board April 30, 1959, extended by order of May 4, 1959, prohibiting the United Mine Workers and its District 19 to engage in "mass picketing, blocking roads, assaulting, clubbing, overturning equipment," etc. (421a-423a).

As shown above the International officers had bragged in reports to international conventions that UMW's organizing drives were not stopped by injunctions issued by numerous courts across the country (819a-821a), and this 1959 drive was not stopped either, although it changed complexion after the injunction, and the field representatives no longer openly engaged in the caravans. The order of the day became shootings from ambush at men trying to work or haul coal and burnings and dynamitings of mining equipment (422a-426a, 490a-491a, 595a-597a, 761a-762a, 843a-844a). It was in this later period that Parton's bulldozer was shot while he was operating it (429a-430a).

The unrest and fear that prevailed in the area continued until in the beginning of 1960 Dean Coal Company moved its loading point over to the other side of the mountain seeking to find a safer place (639a).

It is in the light of such a background as this that plaintiffs produced witnesses in this case who testified that in this later period the field representative was the one who instigated the plan and arranged for them to place explosives on the mining equipment of Dean Coal Company set to go off at the approximate time as the explosion which utterly destroyed the related Double Camp Mining operation near Parton's mine (848a, 869a, 905a, 597a, 423a-426a).

There can be no doubt that the analysis of the record given in the lower court opinions is reasonable and sound and that there is ample proof to sustain the finding of liability on the part of UMW.

B. The Evidence Sufficed to Support the Awards of Compensatory Damages.

The UMW petition goes back to the contention it made on the first appeal in the lower courts, that the award of damages is for the refusal of men to work with resulting decline in production and income, and it says this allows damages for the exercise of the union's right to strike and engage in peaceful activities, again relying on the *Gibbs* case.

Conceding that the damages rest largely on decline in production and income because of mines being closed and because of depleted crews and inability to get men to mine and haul coal, still the principal question is—what caused this. What caused some of the men to turn to the small monthly UMW handouts for those who agreed not to work?

More specifically, were the acts of violence and the reign of terror over a broad area which was attributable to UMW (and which had become a part of the custom and traditional practice of UMW) a substantial cause of the unwillingness of men to show up for jobs and the resulting injury and damage?

In the petition, UMW undertakes to portray Dean Coal Company as a victim of a lengthy strike voluntarily engaged in by its employees. The petition says at page 16:

> "The refusal of the striking Dean employees to work was the main reason Dean lost money in 1959 and 1960 (594a-95a, 609a) and those losses constitute the main element of the damages awarded Dean."

We ask the Court to examine the record referred to. Pages 594a-95a, 609a give no hint of there being a voluntary strike engaged in by any of the men.

The allegations of the petition are without foundation.

The only testimony that could bear on this contention of the union is the testimony of three witnesses introduced by the plaintiff Dean who admitted placing dynamite on the Dean auger during the period of violent activities in 1959 and of the two union officials, who they swore instigated the plot, UMW Field Representative Prater and Local Union President George Cross. None other of the respondents' employees who allegedly voluntarily joined the union were brought in to testify.

The first such witness, Aubrey Cook, said that he joined the Union, after the caravan or mob came and shut the mine down, and he joined out of "fear" and for the $25 per week grocery orders given by the Union (part of the $2,473,000 sent by the UMW as the so-called "strike benefit" exchanged for agreements not to work) (847a).

His accomplice, Mitt Day, when asked why he joined the Union after the shutdown said, "Well, they shut us down and we just joined the Union" (869a). His brother and the third witness relied on by the Union to support its contention, Hubert Day, when asked the same question, said: "Well, they offered us $25 weekly meal tickets or grocery lists, whatever it was, I called them meal tickets" (904a). Many other witnesses testified about the motorcades, mobs, shootings and dynamitings, which inspired fear of the Union during the period of time these three employees of the plaintiff were members of the Union participating in its violent activities. No employee or former employee of Dean Coal Company or of any other such employer was called as a witness by UMW in support of the contention now asserted that the disorganization of the Dean working force was due to anything but shutting of the mine down by force and continued union pressure by unlawful means.

The only other contention made by UMW about the amount of damages awarded was that wage increases rather than violence and intimidation brought on the losses suffered by respondents. But the Trial Court's memorandum, in the words of the Court of Appeals, "demonstrates the zeal with which he approached the task of determining compensatory damages and the fact that he was conscious of the mitigating factors as well as the affirmative elements of damage to be considered" (Page 13a of the Appendix in the back of the petition).

We refer to the Trial Court's memorandum (pages 2a-10a of the Appendix in the back of the petition) to show that petitioner's contention about changes in wages has been fully considered and properly applied in the determination of the amount of damages.

ARGUMENT

I.

THERE WAS AMPLE EVIDENCE TO JUSTIFY THE FINDING OF UMW LIABILITY UNDER THE CLEAR-PROOF RULE.

Argument in this case might well be confined to getting the facts straight with the record after the recitations contained in the petition which give no hint of the true scope of this record. Nowhere in the petition is there any effort to put the incidents that occurred on the premises of respondents into focus with all the massive record about UMW custom and practice for years to force these national contracts on these small coal companies. We have attempted to put the record back into perspective in our counter-statement of facts above.

As to petitioner's contention that there was no "clear-proof" of UMW responsibility for what went on under Norris-LaGuardia Act Section 6, we point to the very case petitioner relies on *United Brotherhood of Carpenters v. United States*, 330 U.S. 395. There, in dealing with the "clear-proof" rule this Court said at 409-410:

> "The grant of authority to an officer of a union to negotiate agreements with employers regarding hours, wages, and working conditions may well be sufficient to make the union liable. An illustrative but nonrestrictive example might be where there was knowing participation by the union in the operation of the illegal agreement after its execution. And the custom or traditional practice of a particular union can also be a source of actual authorization of an officer to act for and bind the union."

We have shown in our statement of facts that even the UMW representatives and district officers testified that the field representatives of UMW were given full leeway to get the contract signatures of the smaller companies (687a, 689a, 1094a-1097a), and caravans containing mobs of men were used, and beatings, whippings and other forms of torture were matters of custom and traditional practice under UMW's national organizing campaigns (819a-21a; 316a-320a; 645a-647a; 655a; 663a).

UMW took full benefit from the results of these activities. The violence and threats have been used not only to get the contract signatures (as in Parton's case (412a-3a)). but also to enforce the contracts (291a-2a; 307a-8a) and to close mines permanently if they refuse to sign (647a). Mines which have been closed by violence are allowed to reopen if they sign the contract (658a).

There can be no question of UMW's responsibility for the outrageous conduct.

The Court of Appeals was truly understating this case when it said at 400 F.2d 816:

> "We are of the opinion that in this lengthy record of a protracted trial, including testimony of interference with hauling operations, verbal threats of work stoppages, the wanton discharge of firearms, the placing of a dynamite charge (albeit unexploded), distribution of gasoline in areas of frequent destruction by arson, all in a locality tense with fear and anger, evidence exists from which conspiracy to commit illegal violence could be found, and that evidence was presented upon which damages under Tennessee law could be predicated."

II.

THE AMOUNT OF DAMAGES AWARDED CORRECTLY REFLECTS THE INJURY PROXIMATELY RESULTING FROM UMW'S VIOLENT EFFORT TO GET RESPONDENTS SIGNED UP UNDER THE UMW CONTRACT.

As to the amount of damages, UMW first argues at page 16 of the petition:

> "The refusal of the striking Dean employees to work was the main reason Dean lost money in 1959 and 1960 (594-95a, 609a) and those losses constitute the main element of the damages awarded Dean."

The idea that there was a voluntary quitting of work and strike by employees of respondent is a most imaginative argument in the light of this full record. There is no testimony from these men that would support such an explanation of their leaving work when the caravan containing the mob descended on their operation. The references to the record in the above quotation do not support that argument.

Rather the record is that these employees who quit did so by reason of fear and they signed with the union to get the weekly union dole or "meal ticket" after the mine was closed down by the union mob from an adjoining county and led by two UMW field representatives (847a; 869a; 904a).

So there is no evidence that the losses of respondents were caused by anything but the fear and dread created by UMW's violent campaign. The enormity of the assault made on the industry in this area is reflected in the sudden tremendous increase in the cost to the international union of the "meal tickets" in the district (691a).

The second argument of petitioner as to the amount of damages has to do with the increase of respondents' wages paid during the period of damage, UMW contending this was a factor that would contribute to respondents' losses which could not be attributed to the violence and intimidation, and this was one of the factors pointed out by the Court of Appeals on the first appeal and remand as needing more specific attention in the findings. The District Court gave close attention to this on the remand and its memorandum thoroughly covers this factor. We refer again to that memorandum (pages 2a-10a in the Appendix in the back of the petition) as being a complete answer to this contention.

CONCLUSION

For the foregoing reasons it is submitted that the petition should be denied.

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